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**RIGHT TO A FAIR TRIAL IN THE COMPETITION LAW
PROCEEDINGS**

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1. Introduction

In the recent years, the importance of competition law is increasing. Not only are the breaches of competition law becoming more frequent, the companies are also finding new ways to conduct in the anti-competitive behaviour. Also, with the increased development of international trade, it is no longer difficult for an anti-competitive behaviour to reach a global character.

All of this has brought to the necessity to invest higher effort in preventing further breaches and adequately punishing the existing ones. This also stresses out the need for efficiency and efficacy of competition law proceedings.

On the one side, one of the results are very high penalties, which can now reach dozens or even hundreds of millions of Euros and can therefore be considered as criminal sanctions by the full meaning of that term. On the other side, the competition proceedings, carried out by the European Commission, have been putting an emphasis on the efficiency and efficacy of the proceedings rather than the full protection of the right of the accused in the criminal law proceedings.

This can lead to some very confusing results-attempting to make the sanctions "more criminal", while in the same time making the procedure leading to those sanctions "non-criminal".

In this paper, I will analyse how far can the consequences of such behaviour reach. I was inspired for this problem particularly by this year's Central and East European Moot Competition¹ case, which I will also refer to in my paper.

¹ Central and East European Moot Competition took place in Vilnius, Lithuania from April 29th to May 2nd 2011. Members of the team were: Nika Bačić, Dora Horvat, Ana Lah and Kristina Mandić

2. EU Competition law and competition proceedings in general – the legal frame

The most important legislation governing the EU competition law are Articles 101 and 102 TFEU², as well as the Competition Regulation³ and the Competition proceedings Regulation⁴. Treaty provisions are setting a general frame on the prohibited agreements, decisions and concerted practices, while the regulations are setting the procedural rules and governing the relationship between national and EU competition law.

Also, there is the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82⁵, setting the guidelines on the relationship between the Commission and the national courts, and the Commission Notice on Immunity from fines and reduction of fines in cartel cases⁶, which is governing the Commission's leniency policy.

² Treaty on the Functioning of the European Union, 30.3.2010., OJ C 83, p.47-199.

³ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003 P. 0001 - 0025

⁴ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24

⁵ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04

⁶ Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11

3. The term 'criminal charge' under the case law of ECtHR

In order to establish the meaning of the term 'criminal charge', one must prefer a substantive, rather than a formal conception of a charge. The reason for this statement is simple; if a certain charge would be considered criminal only if it is defined as such, certain states could avoid applying the procedural safeguards characteristic for criminal procedures simply by defining certain charges as 'non-criminal'. This opinion has also been confirmed by the ECtHR in *Deweer v. Belgium*⁷.

Therefore the ECtHR has, in *Engel*, set three main criteria for a certain conduct to be considered criminal. If these criteria are fulfilled, all the safeguards provided for the criminal law proceedings in the ECHR are to be applied regardless of the formal definition under the national law.

In order for the certain charges to be considered 'criminal', they have to fulfil the following criteria:

- They must be classified as criminal under the national law;
- The offence has to be criminal by its nature; and
- The penalty has to be severe⁸.

⁷ Judgement of ECtHR, 1980 *Deweer v. Belgium*, A 35, §44

⁸ Judgement of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*

Subsequent case law has further clarified these criteria as it follows ⁹:

- A norm of criminal character is usually addressed to everyone, while disciplinary norms are addressed only to a certain group or profession¹⁰;
- Criminal sanctions have a punitive and deterrent effect, and not just a compensatory function¹¹;
- Criminal sanctions have a high level of stigma attached to it.

The most common argument for the non-criminal nature of the EU competition law proceedings is that they are not classified as criminal under the Union law.

Article 23(5) of the Regulation 1/2003¹² states that the decision in which the Commission imposes fines on the undertakings is not of criminal law nature. Nevertheless, it was stated by the ECtHR in *Öztürk v. Germany*¹³ that the classification under the national law is merely a starting point, and that the fact that a certain conduct is not listed as criminal under the national law must not lead to a definitive conclusion that such conduct is not in fact criminal.

Judging the conduct as criminal or non-criminal solely on the basis of the national classification would necessarily lead to inequality in the application of ECtHR. Various procedural safeguards, which are guaranteed particularly in

⁹ D. Slater, S. Thomas and D. Waelbroeck: *Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?* p.2

¹⁰ Judgement of the ECtHR of 24 February 1994, *Bendenoun v. France* and judgment of the ECtHR of 23 November 2006, *Jussila v. Finland*

¹¹ Judgement of the ECtHR of 7 July 1989, *Tre Traktörer AB v. Sweden* and *Bendenoun v. France* (n.10)

¹² Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 23(5) (n.3)

¹³ Judgment of the ECtHR of 21 February 1984, *Öztürk v. Germany* at para. 52

the criminal law proceedings, could easily be avoided by listing the procedures as civil or administrative.

Some are arguing that the breaches of competition law cannot be considered criminal, even if we disregard the insignificance of the classification under the national law. Even the ECtHR has taken some stands that might be interpreted as defending the non-criminal nature of the breaches of competition law.

For example, in *Neste St. Petersburg v. Russia*¹⁴ the ECtHR stated that the freedom of market competition is a relative value, infringement of which is not inherently wrong in itself.

Nevertheless, I find that the increasing breaches of competition law, more complex and dangerous way of conducting anti-competitive behaviour and higher penalties give the competition law breaches a criminal character.

This view found strengthening and additional support in *Jussila*¹⁵ where the ECtHR confirmed that the application of Engel criteria has underpinned a gradual broadening of the criminal head to cases not strictly belonging to traditional categories of the criminal law thus including competition law. Moreover, as the Court explicitly stated in *Hüls*¹⁶ that, due to the nature of the infringement as well as the nature and degree of severity of the sanctions they give rise to, undertakings accused of violations of the competition rules must, for this reason, enjoy guarantees that are provided for procedures of a penal character.

¹⁴ Opinion of AG Sharpston in case C-272/09 P KME, para. 66

¹⁵ *Jussila v. Finland*, at para 2 (n.10)

¹⁶ Case C-199/92 P Hüls AG v Commission of the European Communities [1999], para 150

Furthermore, some might argue that setting the upper limit of the fine imposed under the EU law to 10% of the turnover in the preceding business year, as stated in the Article 23(2) of the Regulation 1/2003¹⁷ takes away the punitive and deterrent effect of the sanction, particularly due to the fact that the undertakings would not engage in the illegal agreement if they did not expect a large profit from such conduct.

Nevertheless, the imposition, or the risk of imposition of a fine up to 10%, of the worldwide turnover of the entire group, as provided in Article 23(2)(c) of the Regulation, reaches the level of criminal sphere. This amount can reach hundreds of millions of Euros, which is definitely to be considered a severe penalty. What is more, as stated in the Commission's Guidelines¹⁸ on the method of setting fines imposed pursuant to Article 23, „fines should have a sufficiently deterrent effect, not only to sanction the undertakings concerned but also in order to deter other undertakings from engaging in behaviour that is contrary to Articles 101 and 102 TFEU“.

¹⁷ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 23(2) (n. 3)

¹⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, JO C 210, 1 September 2006

4. The Commission as an independent and impartial tribunal

After concluding that the proceedings carried out for a breach of competition law are to be considered criminal, I am going to address the question of the body carrying out these proceedings. ECHR and the Charter require that criminal proceedings are carried out by an 'independent and impartial tribunal'. Can the Commission meet these criteria?

In the important case of *Jussila v. Finland*¹⁹ the ECtHR stated that the right to fair trial before an independent and impartial tribunal is particularly important in the criminal context, where generally there must be a first instance a tribunal, which fully meets the requirements of Article 6 (1) ECHR.

It was stated in *Findlay v. the United Kingdom*²⁰ that in order to establish whether a tribunal can be considered as independent regard must be had to: the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.

Convening of the Commission is formed after a political process where each member is appointed by its national government. In order to begin with its activities, the Commission as a college must be approved by the European Parliament.

Members are elected to a 5-year term thus making their re-election subject to a political assessment on how well they

¹⁹ *Jussila v Finland*, para 40 (n. 10)

²⁰ Judgement of ECtHR 1997, *Findlay v. United Kingdom*, para 73

fulfilled their obligations and met the expectations of the ones who elected and approved them. Members of the Commission do not benefit guarantees against outside pressure since the Parliament is empowered to dissolve the Commission.

The current system in which the Commission carries out both the investigatory, prosecutorial and decision-making functions is incompatible with the requirements of Article 6(1). The investigation is conducted by officials of the Commission's Directorate-General for Competition. Those officials work under the authority of the Competition Commissioner, a member of the Commission with special responsibility for competition matters.

The same officials that conducted the investigation draft the Commission's final decision. Moreover, it is adopted by majority vote by the Commission on a proposal of the Competition Commissioner. The lack of legal qualification or experience in the members making the decisions makes it impossible for them to act in an independent or impartial manner.

The Competition Commissioner, member of the Commission, is not to be considered as impartial and unfavourable to the accused since he/she has interests very close to one of the parties to the proceedings – that being himself as a member of the Commission. In addition, the problem of prosecutorial bias rises due to the accumulation of investigative, prosecutorial and adjudicative powers by the Commission.

In addition, officials conducting the procedure within the DG Competition will naturally tend to have a bias in favour of finding a violation once proceedings have been commenced. It is a general tendency of human reasoning to search for

evidence that confirms rather than challenges one's belief. It must be borne in mind that the Commission would, normally, only start an investigation if the officials of DG Competition held the initial belief that an infringement is to be found.

However, the requirements of Article 6(1) ECHR²¹ differ within the overall category of 'criminal charges', as the ECtHR stated in *Jussila*²². One might therefore argue that the interpretation of Article 6(1) ECHR²³ needs to be less stringent in a particular case, as the sanctions imposed by the Commission are not to be considered as "hard-core" criminal sanctions.

Also, the effective full judicial review provided by the General Court and the ECJ is claimed to allow broader interpretation of Article 6(1) ECHR²⁴.

A big step forward was made, by introducing an independent Hearing Officer in the Competition proceedings.

After the DG Competition starts the proceedings by sending a statement of objections to the alleged infringer, an independent Hearing Officer conducts the oral hearings and reports to the Full College of Commissioners, which then brings the final decision based on the reported information.

Under the Article 14 of the Regulation 773/2004²⁵, the Hearing officer conducts the hearings in full independence.

²¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6

²² *Jussila v. Finland* [2006], Application no. 73053/01, para. 43

²³ n. 21

²⁴ n. 21

²⁵ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Article 14, (n. 4)

It thereby overviews the protection of procedural rights, but also reports on the substance of the case. It has two important roles. It conducts oral hearings and it overlooks the decision making process until the draft decision is brought, in order to protect procedural safeguards and application of the facts he collected during the oral hearings.

Consequently, the Commission might be considered to fulfil the requirements of Article 6(1) ECHR, even when it does not formally fulfil all of the requirements for an independent and impartial tribunal²⁶.

²⁶ Judgement of the EctHR of 18 June 1971, De Wilde, Ooms and Versyp, par. 78

5. Proceedings in front of the Commission and the right to a fair trial

In the April/May 2011, I have participated in the Central and East European Moot Court Competition. The hypothetical case that was put in front of us was a perfect example of the consequences that EU competition law is allowing at the moment.

5.1. Hypothetical case

Esilanep is an EU member state, which has been dealing with breaches of competition law for a long time. To put an end to it, it drafts a new law that proclaims all of the competition law breaches as criminal actions.

One of the sanctions prescribed for a breach of competition law is a mandatory directors' disqualification in case that a certain fine has been imposed on an undertaking. The only condition for this mandatory disqualification, this criminal sanction, is that the director was found to have been knowingly involved in the infringement. This finding can be made either by the national bodies, or by the Commission.

Redulloc plc. is an undertaking operating in various EU countries, and has been found responsible for a breach of the EU competition law. One of the bases for this finding was the secret whistle-blower's report submitted to the Commission, claiming that Mr Rorroh Erih, a non-executive director, had been knowingly involved in the infringement.

Therefore, the Commission had imposed a fine on Redulloc plc., and only underlined in its decision that Mr Erih was found to have been knowingly involved in the infringement. The Commission made this decision without providing Mr Erih with any hearing at all. This might be justified from the Commission's point of view, as it seems that Mr Erih is not directly affected by the Commission's decision.

On the other hand, the consequences of the Commission's finding lead to Mr Erih being automatically disqualified from his director's position and losing his income. Moreover, this sanction is considered a criminal sanction under the national law.

Even though the national legislation has all the necessary safeguards for the protection of a right to a fair trial in the criminal law proceedings, national courts could not find that Mr Erih is innocent due to Article 16 of the Competition regulation²⁷.

The question that appears is who is to be blamed for this situation? National legislator is allowed to rely on the lawfulness of the Commission's proceedings, particularly due to that fact that the Regulations governing the Competition proceedings do guarantee a right to a fair trial for the alleged infringer. Furthermore, no support can be found in the Union's legislation that the national bodies could not prescribe criminal sanctions on natural persons based on the Commission's decision. What is more, the Competition regulation explicitly mentions that possibility in Recital 8.

²⁷ Article 16 of the Regulation 1/2003 (n. 3) "When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission"

On the other hand, Commission's proceedings should not be considered to violate the right to a fair trial, as it has been respected towards all of the parties directly affected by the Commission's decision. The national legislator was not under an obligation to prescribe this additional criminal sanction on the director, and therefore the Commission cannot be expected to provide him with a hearing.

5.2. Article 16 of the Regulation 1/2003

In order to secure uniform application of Union's competition law, Article 16 of the Regulation 1/2003 states that no decision of the national body can run counter to the Commission's decision. Can this provision be considered valid in the light of the Charter, particularly due to the fact that the Regulation allows for the national law to prescribe additional criminal sanctions on natural persons?

Under the Article 16 of the Regulation 1/2003, when the national courts are taking decisions under Articles 101 and 102 TFEU, they cannot take a decision that would run counter to the Commission's decision in that matter.

In the hypothetical case, the question is whether the national courts would be allowed to find that Mr Erih had not been knowingly involved in the infringement, considering the fact that the Commission has taken the opposite stand.

On the one hand, the national courts and competition authorities should be able to decide freely on that matter,

as the operative part of Commission's decision does not extend to finding of Mr. Erih's infringement and therefore this finding should not even be considered as a part of the Commissions decision.

The Commission does not have the competence to decide on the infringement of a natural person due to the fact that the Community competition law refers only to the activities of undertakings, as the Court stated in Akzo²⁸ and Volkswagen²⁹. Moreover, the competences conferred to the Commission under the Regulations 1/2003 and 773/2004 refer only to decisions concerning infringements of undertakings, and not of natural persons.

Furthermore, under the Article 10 of the Regulation 773/2004³⁰, the Commission shall inform the parties concerned in writing of the objections raised against them. If Mr Erih had been regarded as a party concerned, he would have been an addressee of the statement of objections. In addition, under the Article 11 of the Regulation 773/2004³¹, the Commission shall, in its decisions, deal only with objections in respect of which the parties referred to have been able to comment. Due to the fact that Mr Erih was not able to comment on the objections raised against him, finding on his infringement should not be considered as a part of its decision.

For all of the reasons mentioned above, I believe that deciding on Mr Erih's infringement should not be considered as a part of the Commission's decision, and the national

²⁸ Case C-97/08 Akzo Nobel NV v Commission, para. 54,

²⁹ Case C-338/00 P Volkswagen AG v Commission, para. 96,

³⁰ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Article 10

³¹ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Article 11

bodies should therefore be able to freely decide on that matter.

Moreover, if the national bodies would be prevented from making the opposite findings, it would go against the principle of proportionality.

As stated in the Recital 34 of its preamble, the Regulation 1/2003³² does not go beyond what is necessary to allow the Community competition rules to be applied effectively.

Binding the national court with the Commission's decision when deciding on criminal liability of a natural person is not necessary for the effective application of Community competition rules.

Also, it is stated in the Recital 22 of the Regulation 1/2003³³ that the main purpose of Article 16 is to ensure legal certainty and uniform application of the Community competition rules in a system of parallel powers. But I believe that deciding on Mr Erih's criminal liability could not be considered as exercising parallel powers with the Commission, due to the fact that the Commission does not have such competence at all.

Deciding freely on Mr Erih's criminal liability would not in any way affect the Commission's decision. Therefore, the Community competition rules would not be applying in an inconsistent manner.

³² Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n.3), Recital 34,

³³ *ibid.*, Article 16,

Nevertheless, by the strict grammatical interpretation of Article 16 of the Competition Regulation, the only decision national courts could make would be finding Mr Erih guilty. Therefore, the question that appears is whether Article 16 could be considered precluded by articles 47 and 48 of the Charter, governing the right to an effective remedy and the right to a fair trial, due to the fact that Mr Erih was not provided with any hearing at all.

The Regulation 1/2003 allows, in its recital, for the national legislation to prescribe additional criminal sanctions on natural persons³⁴. Nevertheless, Article 16 of the Regulation 1/2003 does not take into account such possibility when binding the national courts with the Commission's decision, as the Commission's proceedings do not provide sufficient protection of the rights in criminal proceedings.

Therefore, as could be seen from the hypothetical case, binding the national courts with the Commission's decision might in some cases deprive the alleged infringer of the right to a fair and public hearing.

But even if this alleged infringer would have been provided with a hearing in the proceedings in front of the Commission, that hearing still would not have been in accordance with the right to a fair hearing as required by Article 47 CFR.

The parties' appearance before the Hearing Officer cannot qualify as the 'public hearing' required by Article

³⁴ *ibid.*, Recital 8

47 CFR as it is not open to the public, as stated in the Article 14(6) of the Regulation 773/2004³⁵.

Moreover, it is held in the absence of the final adjudicator. The Hearing Officer reports to the Competition Commissioner, who brings the case before the full College of Commissioners. The College of Commissioners then brings the final decision.

Furthermore, such implementation of the Commission's decision into the decision of the national courts, without insight into any evidence, would be contrary to the presumption of innocence. The national courts could not be satisfied beyond reasonable doubt that the infringement has occurred, but they would still have to bring a decision on criminal liability of a natural person.

On the other hand, it can be argued that it is justifiable to put an emphasis on the principle of legal certainty and uniform application of the Commission's decisions, because the review by the General Court as well as the European Court of Justice guarantee the protection of fundamental rights enshrined in the Charter. Therefore, even if the right to a fair trial would be violated in the proceedings in front of the Commission, these violations could be remedied in the proceedings in front of the General Court and the European Court of Justice. These proceedings can remedy any deficiencies in Commission's proceedings, as Advocate General Sharpston stated in her opinion in KME³⁶.

³⁵ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Article 14(6),

³⁶ Opinion of AG Sharpston of 10 February 2011, Case C-272/09 P KME, para. 67,

According to stance of the ECJ in Hüls³⁷, acts of the Commission, as well as any Community institution, are in principle presumed to be lawful. They produce legal effects even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

Recital 37 of the Regulation 1/2003 emphasizes that the Commission will have respect for the fundamental rights recognized in the Charter and will interpret the provisions of the Regulation with respect to those rights and principles. Moreover, Article 31 of the same regulation states that Court of Justice, which procedure is doubtlessly in accordance with the mentioned rights, has unlimited jurisdiction to review Commission's decisions.

Due to the fact that there are no obvious breaches of the right to a fair trial coming from the text of the Regulation, it can be argued that the presumption of lawfulness of the Union's acts should also stand here in its full power.

It is on ECJ to determine the existence of irregularities and to act upon it. The national bodies, however, are bound by the presumption that the decision-making procedure has guaranteed all the rights from the Charter.

³⁷ C-199/92 Hüls AG v Commission of the European Communities, para. 84,

6. Commission's Leniency policy and cooperation with the national bodies

The Commission's duty to protect confidential information disclosed by the leniency applicant without an exception can lead to restrictions of rights of defence of the accused in the competition proceedings.

Under the current regime, the Commission is under no obligation to disclose information given to it by the leniency applicant, even if this disclosure would be necessary to protect the rights of the accused in the proceedings in front of the national bodies. Reading this provision together with the previously mentioned problems (allowing the national legislator to prescribe additional criminal sanctions on natural persons, Article 16 of the Competition Regulation), it can lead to the situations where the national bodies need to bring a decision on a person's guilt without having insight into any evidence against that person.

To clarify, if the Commission brings a decision on a person's liability for a breach of Competition law, and the national law contains a provision about additional criminal sanctions for the same breach, the national bodies would have to bring a decision which would not run counter to the Commission's decision, as required by the Article 16 of the Regulation 1/2003. That means that the national courts will also need to find this person guilty.

And in case where the Commission bases its decision on the Leniency applicant's information, under the current regime

the Commission would not have to disclose this confidential information to the national courts. Therefore, the national courts would have to bring a decision about a person's criminal liability without having insight into any evidence against this person.

This regime has become problematic particularly due to the recent development of the importance of the competition law and the frequent use of the Commission's leniency policy in that area. As previously stated, the Commission's competition law proceedings are to be considered criminal. By allowing the Commission to conduct the criminal proceedings without the accused having any insight into the evidence against him is definitely contrary to the right to a fair trial.

With entry into force of the Treaty of Lisbon, Article 4 (3) TEU states for the first time that the Union is obliged to cooperate with the Member States, and not just the other way around. The broader scope of the new Article 4(3) TEU calls for a greater co-operation between the Union and the member states, and consequently, different interpretation of the Commission Notice on the co-operation with the national courts³⁸.

According to the Commission Notice³⁹, the Commission has to act as Amicus Curiae. It is committed to help the national courts where they find such help necessary to be able to decide on a case.

³⁸ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, *OJ C 101* , 27/04/2004 P. 0054 - 0064

³⁹ *ibid.*

Article 10 EC (now Article 4(3) TEU)⁴⁰ implies the duty of the Commission to disclose leniency applicant's report to the national court when it applies Articles 101 and 102 TFEU. The Commission Notice⁴¹ relies upon the case law of the ECJ to support this duty.

Nevertheless, the Notice is setting the boundaries to this duty, which now, after entry into force of the Treaty of Lisbon, need to be removed. The national courts should not be required to provide guarantees for the protection of the professional secrecy when asking for information under Article 15 of the Regulation 1/2003⁴². The Article 28(2) of the Regulation 1/2003⁴³, which gives special expression to the duty to protect professional secrecy under the Treaty, states that such duty shall be without prejudice to the exchange of information under Article 15 of the Regulation.

Furthermore, the duty of the Commission to gain the consent of the leniency applicant in order to disclose the report to the national courts is prescribed by the Commission Notice, which however is not legally binding. Such duty causes the imposition of the sanctions by the national court being dependant on the approval of the leniency applicant.

⁴⁰ The Treaty on European Union, Article 4(3), *OJ C 83 of 30.3.2010*

⁴¹ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, (n.38), para. 15

⁴² „In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.”

⁴³ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (n. 3), Article 28

If the Commission's Leniency policy would preclude disclosing of any information without exception, it would be contrary to Article 6 ECHR⁴⁴. The Commission should be obliged to disclose the report covered by the Leniency policy, since such disclosure is necessary to protect the rights of defence.

On the other side, disclosing the information of the leniency applicant without provision of guarantees might seriously endanger Commission's leniency policy and thus discourage the future whistle-blowers from reporting the cartel behaviour.

Information covered by the Commission's leniency policy should be considered as confidential information under the Regulation 773/2004, as its disclosure would compromise the identity and the rights of the witness protected under the Commission's Leniency policy.

Therefore, the Commission is empowered to assess the potential harm that might occur from the disclosure, and consequently decide whether it will disclose information, as stated in the Recital 14 of the Regulation 773/2004⁴⁵.

The Commission can disclose confidential information only if the national court provides for the guarantees that it will protect confidential information, as stated in the Commission Notice⁴⁶. The mere possibility of disclosing the Commission's report to the public would seriously endanger Commission's leniency policy, as it might discourage future

⁴⁴ European Convention of Human Rights and Fundamental Freedoms (ECHR), Article 6

⁴⁵ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Recital 14

⁴⁶ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (n. 38), para. 25

leniency applicants from reporting the cartels. This could jeopardize tasks entrusted to the Commission and interfere with its functioning, as stated in the Notice.

Furthermore, it is explicitly stated that, when it comes to leniency policy, the Commission will not transmit information submitted by a leniency applicant without his consent.

According to the Leniency notice⁴⁷, the leniency applicant may rely on the principle of legitimate expectations, when disclosing the existence of cartel. Therefore, the Union measures must not violate such expectations.

⁴⁷ Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, para. 38

7. Conclusion

Balancing the need to quickly and effectively punish the infringers of competition law with the protection of human rights in the same proceedings has never been an easy task. Nevertheless, this task is getting harder due to the increased importance of competition law in the modern world.

Even though the described case is a hypothetical one, it is not difficult to imagine a situation like this happening in the real world. Many countries have exactly the same legislation in the area of competition law, so I will be bold to say that it is just a matter of coincidence that such serious breaches of human rights have not yet occurred.

While writing this paper, I have tried to turn to the both sides of the medal- to look at the situation through the eyes of the EU legislator, and through the eyes of an individual that might be affected by the consequences of such legislation.

The questions that were set in this paper have no concrete answer; it is impossible to find a balance between these two values.

Nevertheless, I believe that the EU competition law should be revised and that safeguards for the protection of a right to a fair trial should be stronger in the proceedings against the infringers of competition law. If not towards the undertakings, then at least towards the individuals which might be affected by the decisions.

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2. Judgement of the ECtHR of 8 June 1976, Engel and others v. the Netherlands
3. Judgement of the ECtHR of 24 February 1994, Bendenoun v. France
4. Judgment of the EctHR of 23 November 2006, Jussila v. Finland
5. Judgement of the ECtHR of 7 July 1989, Tre Traktörer AB v. Sweden
6. Judgment of the ECtHR of 21 February 1984, Öztürk v. Germany
7. Judgement of ECtHR 1997, Findlay v. United Kingdom
8. Judgement of the EctHR of 18 June 1971, De Wilde, Ooms and Versyp

Case law ECJ and opinions of AG's:

1. Case C-199/92 P Hüls AG v Commission of the European Communities [1999],
2. Case C-97/08 Akzo Nobel NV v Commission
3. Case C-338/00 P Volkswagen AG v Commission
4. Opinion of AG Sharpston of 10 February 2011, Case C-272/09 P KME